Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1454

NOVELLA H. TRAGESER,

Petitioner,

—v.—

LIBBIE REHABILITATION CENTER, INC.,
t/a Libbie Convalescent Home,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

NOVELLA H. TRAGESER,

Petitioner,

-v.-

LIBBIE REHABILITATION CENTER, INC. t/a Libbie Convalescent Home,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Novella H. Trageser prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on December 18, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and is appended hereto at pp. 2A - 10A, infra. The opinion of the district court is reported at 462 F.Supp. 424

(E.D.Va. 1977) and is appended hereto at pp. 11A - 15A, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 18, 1978, and is appended hereto at p. 1A, infra. This Court has jurisdiction to review that judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits all recipients of federal financial assistance from discriminating against handicapped persons in employment.

2. Whether Section 120(a) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, P.L. 95-602 (Nov. 6, 1978) was intended by Congress to exempt employment discrimination from the discrimination prohibited by Section 504 in private suits unless a primary objective of the federal financial assistance is to provide employment.

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. § 794 (Supp. 1977), provides in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The relevant portion of § 120(a) of the Rehabilitation, Comprehensive Services and Developmental Amendments of 1978, P.L. 95-602, to be codified as 29 U.S.C. § 794a (a)(2), provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under § 504 of this Act.

Section 604 of Title VI of the Civil Rights Act of 1964, codified as 42 U.S.C. § 2000d-3, provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any

employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

STATEMENT OF THE CASE

This action was brought pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (hereinafter the "Rehabilitation Act") and 42 U.S.C. § 1983, with jurisdiction based on the Rehabilitation Act and on 28 U.S.C. § 1343. Petitioner Novella H. Trageser, a registered nurse, is a handicapped person[1/] who was employed by the respondent Libbie Rehabilitation Center, Inc., from 1971 until September 1976.[2/] Respondent is a private corporation, operating a nursing home for profit, which receives substantial federal funds under

1/ Petitioner suffers from a hereditary, progressive visual impairment known as retinitis pigmentosa. 3A. It is undisputed that petitioner is a handicapped person within the meaning of the Rehabilitation Act.

2/ Petitioner received promotions to the position of supervisor of Libbie Convalescent Center, Assistant Director of Nurses, and finally Director of Nurses, the position she occupied at the time her employment was terminated. 3A.

under the Medicare, Medicaid, and Veterans Administration programs. 3A. At a meeting of its Board of Directors on June 7, 1976, respondent decided to dismiss petitioner "as soon as possible" because of her impaired eyesight. 4A. Upon learning of her imminent dismissal, petitioner resigned.[3/]

Petitioner alleged that respondent's decision to terminate her employment solely because of her physical handicap constituted discrimination in violation of Section 504 of the Rehabilitation Act. The district court dismissed her complaint, prior to trial, holding that § 504 does not create a private right of action and, alternatively, that § 504 does not apply to respondent. 13A-14A.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit; after briefing and oral argument, Congress enacted the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, P.L. 95-602, Nov. 6 1978 (hereinafter the "1978 Amendments"). The Court of Appeals,

3/ The court below treated petitioner's resignation as "tantamount to discharge." 4A.

sua sponte, requested supplemental briefs concerning the "impact" of the 1978 Amendments "on this case." Without passing on either of the district court's grounds for judgment,[4/] the Court of Appeals affirmed dismissal of the complaint, holding that the 1978 Amendments required the application of § 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-3 (hereinafter "Title VI") to Section 504 of the Rehabilitation Act, and holding further that because of § 604, a private action under § 504 to redress employment discrimination may not be maintained unless a primary objective of the federal financial assistance to the allegedly discriminatory employer is to provide employment. 8A.

4/ Accordingly, the broader questions of whether there can be a private right of action under § 504 in a non-employment context or when a primary objective of the federal financial assistance is to provide employment, is not at issue here. The first question is presently before this Court in Southeastern Community College v. Davis, No. 77-1237. Also, because the Court of Appeals did not pass upon the application of § 504 to respondent, that issue is not before the Court.

REASONS FOR GRANTING THE WRIT

This case involves an extremely important statutory issue. This Court, recognizing the importance of § 504, has granted certiorari in Southeastern Community College v. Davis, No. 77-1237, which involves the closely related question of whether § 504 authorizes private suits alleging discrimination in higher education. Whether § 504 authorizes private suits to redress employment discrimination is a question of equal importance. Indeed, access to higher education is a meaningful right only if employment opportunities are thereafter available on a non-discriminatory basis. The decision of the Court of Appeals conflicts with the Congressional purpose in enacting § 504 of the Rehabilitation Act and § 120(a) of the 1978 Amendments, and with the well-established construction given § 504 by HEW, the administrative agency charged with its enforcement. The decision below severely disrupts HEW's nation-wide efforts to administer and enforce § 504,[5/] and is of vital concern

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5/ This case is of such importance to the federal government's § 504 enforcement program that the United States filed a brief amicus curiae in support of the petitioner in the Court of Appeals.

to thousands of recipients of federal financial assistance[6/] and to millions of handicapped persons.[7/]

6/ At least 36,000 recipients of funds distributed by the Department of Health, Education and Welfare alone are affected. See Hearings on Implementation of Section 504 before the Select Subcomm. on Education of the House Comm. on Education and Labor, 95th Congress, 1st Session 299, 358 (1977) (testimony of David S. Tatel, Director, HEW Office of Civil Rights).

7/ There are an estimated 15.5 million non-institutionalized handicapped persons between the ages of 18 and 64. H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. ___, 1978 U.S. Code Cong. & Admin. News 7513. There are an estimated 6 million disabled persons who could benefit from vocational rehabilitation, and 500,000 persons with disabilities are added to the national population annually. H.R. Rep. No. 95-1149, supra at ___, 1978 U.S. Code Cong. & Admin. News, supra at 7499.

I. THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE CONGRESSIONAL PURPOSE IN ENACTING SECTION 504 OF THE REHABILITATION ACT, WITH SECTION 120(a) OF THE 1978 AMENDMENTS, AND WITH THE INTERPRETATION OF SECTION 504 BY THE ADMINISTRATIVE AGENCY CHARGED WITH ITS ENFORCEMENT.

A. As Originally Enacted, Section 504 Clearly Prohibited Discrimination In Employment On The Basis Of Handicap.

It is indisputable that prior to the 1978 Amendments, § 504 outlawed all employment discrimination, regardless of the object of Federal aid. Section 504 was originally enacted as part of Title V of a comprehensive reform of the federal vocational rehabilitation program. The other principal sections of Title V, with one exception, concerned employment of handicapped individuals.[8/] As originally enacted, the term "handicapped individual"

8/ Section 501 required that federal government agencies and departments take affirmative action to employ and advance in employment handicapped persons. 29 U.S.C. § 791. Section 503 required federal government contractors and subcontractors to take affirmative action to employ and advance in employment qualified handicapped individuals.

was defined solely in relationship to employment.[9/]

An explicit purpose of the 1974 Act was to:

> "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." 29 U.S.C. § 701(8).

The following year, recognizing that its definition of handicapped individual was limited to employment, Congress amended § 7(6) to exclude reference to employment.[10/] Congress made

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9/ Section 7(6) of the Rehabilitation Act of 1973 provided:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.

10/ P.L. 93-516, § 111(a) provided:

> Section 7(6) of such Act is amended by adding at the end thereof the following new sentence: "For the purposes of titles IV and V of this Act, such term means any person who (A) has a physical or mental impairment which substantially

(FN 10 continued on next page)

clear, however, that it did not intend to remove employment discrimination from the scope of § 504; rather, the intention was to preclude the narrow application of § 504 solely to employment.[11/]

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limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."

11/ The Senate Report on the 1974 amendment stated:

> Section 7(6) of the Rehabilitation Act of 1973 defines "handicapped individual." That definition has proven to be troublesome in its application to provisions of the Act such as sections 504 and 504 because of its orientation toward employment and its relation to vocational rehabilitation services. It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individual" in those sections was not to be narrowly limited to employment (in the case of section 504), nor to the individual's potential benefit from vocational rehabilitation services under titles I and III (in the case of both sections 503 and 504) of the Act." S. Rep. No. 93-1139, 93rd Cong., 2d Sess. 23 (1974).

In describing the new definition, the report further explained:

> Thus, a new definition has been developed which would provide

(FN 11 continued on next page)

Prior to the 1978 Amendments, numerous courts had ruled that § 504 prohibits employment discrimination, regardless of the object of Federal aid. See Whitaker v. Board of Higher Education of the City of New York, 461 F. Supp. 99 (E.D.N.Y. 1978); Davis v. Boucher, 451 F. Supp. 791 (E.D.Pa. 1978); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977). See also Gurmankin v. Costanza, 556 F.2d 184, 186 (3rd Cir. 1977).

Thus, the language of the original legislation, the stated Congressional purpose, the legislative history of the 1974 clarifying amendments and judicial decisions make clear that § 504 broadly prohibited discrimination in employment in programs receiving federal funds, without regard to whether the primary object of federal

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sufficient latitude (but still not be totally open ended), particularly for the nondiscrimination programs carried out under sections 501, 503, and 504 with respect to the employment of handicapped individuals in the Federal government, under Federal contracts and subcontracts, pursuant to the provision of Federal financial assistance, and in State rehabilitation agencies and local facilities, and the participation of handicapped individuals in any program or activity receiving Federal financial assistance." Id. (emphasis added).

financial assistance was to provide employment.

B. Section 120(a) Of The 1978 Amendments Was Not Intended To Eliminate Employment Discrimination From The Scope Of Section 504.

Against this background, the question is whether Congress intended to change the substantive scope of § 504 in the 1978 Amendments. Given the clear legislative purpose to promote and expand employment opportunities, a Congressional intent to cut back on § 504 is not lightly to be inferred.

The Court of Appeals misconstrued § 120(a) of the 1978 Amendments, in holding that § 604 of Title VI removed employment discrimination from the scope of § 504 unless a primary objective of federal funds was to provide employment. To the contrary, the purpose of § 120(a) was to expand the rights of handicapped individuals by providing an additional enforcement mechanism for § 504 without cutting back on the substantive scope of its application. This is readily apparent from the language of the 1978 Amendments taken as a whole and from its legislative history.

1. The language of § 120(a).

The language of § 120(a) does not support the conclusion of the Court of Appeals that 42 U.S.C. § 2000d-3 precludes private suits for employment discrimination under § 504 unless the primary objective of the federal funds is to provide employment. Had Congress intended to make § 504 subject to all of Title VI, it could have so stated. Significantly, Congress limited the applicability of Title VI to its provisions concerning "remedies, procedures, and rights," that is, the remedies and procedures for effecting compliance with § 2000d as set forth in 42 U.S.C. § 2000d-1, and the right to judicial review of administrative agency action set forth in 42 U.S.C. § 2000d-2. Clearly, all of Title VI cannot apply to § 504, for 42 U.S.C. §§ 2000d-5 and 2000d-6 are patently inapplicable. By its terms, § 604 of Title VI (42 U.S.C. § 2000d-3) does not set forth rights, remedies or procedures, but rather limits the substantive coverage of § 601. Accordingly, it is clear from the face of § 604 that it was not intended to apply to § 504 of the Rehabilitation Act.

That § 120(a) of the 1978 Amendments was intended solely to provide an

expanded enforcement mechanism for § 504, not to restrict its coverage of employment discrimination, is further demonstrated by the legislative history of the 1978 Amendments.

2. The legislative history of the relevant subsection.

The relevant subsection originated in the Senate. The House bill contained no similar provision. See House Conference Rep. No. 95-1780, 95th Cong. 2d Sess. ___. The report of the Senate Committee on Human Resources explains the relevant section as follows:

> Subsection (a)(2) of the new section makes available the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 to any person aggrieved by any act or failure to act by any recipient of Federal assistance or any Federal provider of Federal assistance under section 504 of the Rehabilitation Act of 1973.
>
> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement.

The joint explanatory statement accompanying the conference report

> on H.R. 14225 (the Rehabilitation Act Amendments of 1974) stressed this parallel relationship between section 504 and title VI of the Civil Rights Act of 1964, and noted that application of the provisions relating to discrimination on the basis of race, creed, color, or national origin would assure administrative due process, and provide for administrative consistency within the Federal government. (emphasis added) S. Rep. No. 95-890, Comm. on Human Resources, 95th Cong., 2d Sess. 19 (1978)12/

Since the legislative history indicates that the purpose of this section was to

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12/ The joint explanatory statement in connection with the Rehabilitation Act Amendments of 1974 indicated that although enforcement mechanisms were not expressly provided for under §504 it was the intent of Congress that the essential features of Title VI enforcement would be applied to § 504:

> "Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide

"codify existing practice" under HEW regulations, those regulations control its construction. HEW has consistently

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> for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended. (emphasis added).
>
> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient, or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with section 504. This approach to implementation of section 504, which closely follows the

(FN 12 continued on next page)

interpreted § 504 to prohibit employment discrimination in all programs and activities receiving or benefitting from federal financial assistance, without regard to the objective of federal financial assistance. 45 C.F.R. §§ 84.11-18 (issued May 7, 1977 and effective June 3, 1977 , 42 Fed. Reg. 22676); 45 C.F.R. §§ 85.53-55 (effective January 13, 1978), 43 Fed. Reg. 2132-39).13/

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models of the above-cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action. S. Rep. No. 93-1297, 93rd Cong., 2d Sess. 39-40. (emphasis added).

The reference to this language from the 1974 report is significant inasmuch as it makes clear that this section makes no substantive change in the scope of § 504, and that it merely makes available enforcement mechanisms for suits under § 504.

13/ Indeed, in its publication of proposed rules, HEW specifically noted that although § 504 was substantially similar to Title VI, it differed in that § 504 prohibited employment discrimination. 41 Fed. Reg. 29518 (July 16, 1976).

The decision of the Court of Appeals is thus contrary to the well-established construction given § 504 by the administrative agency charged with its enforcement.14/

3. Other provisions of the 1978 Amendments

Other provisions of the 1978 Amendments buttress the conclusion that the purpose of the legislation as a whole was to expand the rights of handicapped persons.

First, § 120(a) also makes available the Title VII rights of federal employees, 42 U.S.C. § 2000c-5 (f) through (k), to suits brought pursuant to § 501 of the Rehabilitation Act.15/

14/ The Court of Appeals dismissed HEW's interpretation, stating that HEW had not yet had the opportunity to conform its regulations to the 1978 Amendments. But since § 120(a) was intended to codify existing HEW regulations, no changes in those were required.

15/ The Court of Appeals mistakenly relied on the inclusion of Title VII remedies for § 501 violations to support its conclusion that § 504 did not apply to employment unless a primary object of federal funding was to provide employment. To the contrary, this evidences Congress' purpose to adopt solely expanded enforcement mechanisms for § 504 without cutting back on the substantive scope of its coverage. Section 501 applies solely to employment so that Title VII was fully effective to

(FN 15 continued on next page)

Another clause of 120(a), providing for the award of attorneys's fees to prevailing parties in actions to enforce the provisions of Title V of the Rehabilitation Act, further underscores that Congress' sole intent in the 1978 Amendments was to encourage and enhance private enforcement rights for all of the provisions of Title V.

Finally, the clarification of the definition of handicapped individuals conclusively establishes that § 504 applies to employment.16/

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provide a remedy for its violation. Section 504 applies not only to employment, but also to housing, transportation, health care, education, social services and welfare. Mere adoption of Title VII would have provided no remedy for violations of these other aspects of § 504. Title VI is closer in its scope of coverage and the class to whom it applies and, therefore, the enforcement mechanisms of that statute were more appropriate for § 504 than were the enforcement mechanisms of Title VII.

16/ Section 122(a)(6) added the following to the definition of "handicapped individual" contained in § 7(6) of the Rehabilitation Act:

> For purposes of sections 503 and 504 as such sections relate to employment such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of

(FN 16 continued on next page)

In summary, it would be truly remarkable that Congress, in enacting § 120(a), would eliminate employment discrimination from the scope of coverage of § 504, when equal employment opportunity was an express statutory purpose, the consistent administrative interpretation of the statute included all employment discrimination, and the entire thrust of the legislative history indicates that Congress intended to incorporate earlier developed enforcement mechanisms and interpretations. It is even more remarkable that Congress would eliminate employment discrimination from § 504 without a single comment, either in hearings, reports, or debates, to the effect that such a result was desirable.17/

> the job in question or whose employment by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

If § 504 did not "relate to employment" discrimination it would not have been necessary to include that section in the amendment.

17/ Indeed, in oversight hearings conducted by the Select Subcommittee on Education of the House Committee on Education and Labor on the Implementation of § 504, 95th Cong., 2d Sess., David Tatel, the Director of the Office for Civil Rights of HEW, testified that 70% of the complaints received under

(FN 17 continued on next page)

The decision of the Court of Appeals is in direct conflict with the intent of Congress and with the well-established administrative interpretation of § 504.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration. Alternatively, this Court should grant certiorari and summarily reverse the judgment below.

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§ 504 concerned employment. Id. at 303, 341. In his testimony, he also fully described HEW's enforcement program and regulations, and his belief that there should be a private right of action to enforce § 504. Id. at 291-337, 358,366.

Dated: March 16, 1979
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Filed December 18, 1978

J U D G M E N T

United States Court of Appeals
for the
Fourth Circuit

No. 77-2224

Novella H. Trageser,

Appellant,

versus

Libbie Rehabilitation Center, Inc.,
t/a Libbie Convalescent Home,

Appellee.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

[William K. Slate II]

CLERK

P U B L I S H E D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2224

Novella H. Trageser,

Appellant,

-v-

Libbie Rehabilitation Center, Inc.,
t/a Libbie Convalescent Home,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued June 7, 1978
Decided December 18, 1978

Before BUTZNER and HALL, Circuit Judges, and ROBERT F. CHAPMAN, United States District Judge for the District of South Carolina, sitting by designation.

G. Timothy Oksman (Farino & Oksman on brief) for appellant; Lewis T. Booker (Charles S. McCandlish, Hunton & Williams on brief) for appellee. United States of America (Drew S. Days, III, Assistant Attorney General, Walter W. Barnett and Judith E. Wolf, attorneys, Dept. of Justice on brief) and National Federation of the Blind (John F. Rick on brief) amici curiae in support of appellant.

BUTZNER, Circuit Judge:

Novella H. Trageser appeals the district court's dismissal of her complaint alleging that the termination of her employment at Libbie Rehabilitation Center constituted handicap discrimination in violation of §504 of the Rehabilitation Act of 1973, the fifth and fourteenth amendments to the Constitution, and 42 U.S.C. § 1983. We affirm because § 120(a) of the Comprehensive Rehabilitation Services Amendments of 1978 forecloses her claim under the Rehabilitation Act of 1973, and lack of governmental action precludes recovery on the other grounds.

I

Libbie, a private corporation, operates a nursing home for profit in Richmond, Virginia. It receives substantial income from the state and federal governments in the form of Medicare, Medicaid, Veterans Administration, and welfare payments. The purpose of these payments is to compensate for treatment of specified patients who are entitled to the benefits. The home is subject to inspection by the Virginia Department of Health.

Trageser, a registered nurse, was hired in 1971 and promoted to director of nurses in 1975. Her sight is impaired by a condition known as retinitis pigmentosa, which is hereditary and progressive.

On April 28, 1976, the certification officer from the Virginia Department of Health conducted a regular inspection of the nursing home. The inspector told the administrator of the home that Trageser's eyesight had deteriorated since the last inspection and asked what the home intended to do about it. The admin-

istrator relayed these comments to the board of directors. At its meeting on June 7, 1976, the board resolved to dismiss her. Upon learning of this decision, Trageser resigned.

Trageser then brought this action seeking reinstatement, back pay, and an injunction against payment of federal financial assistance to the home unless she was reinstated. The district court treated the termination of her employment as tantamount to discharge, but it granted Libbie's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. See Trageser v. Libbie Rehabilitation Center, 16 E.P.D. ¶ 8117, 17 F.E.P. Cases 398 (E.D. Va. 1977).

II

Trageser bases her claim on § 504 of the Rehabilitation Act of 1973[1] which provides as follows:

> No otherwise qualified handicapped individual in the United States. . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

In § 120(a) of the Comprehensive Rehabilitation Services Amendments of 1978, Congress added, among other provisions, § 505(a)(2) [2] which states:

1. 29 U.S.C.A. § 794 (1975).

2. Act of November 6, 1978, Pub.L.No. 95-602, § 120(a), H.R. Conf. Rep. No. 95-1780 on H.R. 12467, 95th Cong., 2d Sess. 29 (1978), 124 Cong. Rec. H12675 (daily ed., Oct. 12, 1978) (to be codified as 29 U.S.C. § 795(a)(2).

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act of failure to act by any recipient of Federal assistance or Federal provider of such assistance under §504 of this Act.

Title VI contains the prototype of § 504 of the Rehabilitation Act. See Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1280 and n.9 (7th Cir. 1977). Section 601 of Title VI [3] provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The broad prohibition of § 601 is, however, qualified by § 604 [4] which creates the following limitation:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.[5]

3. 42 U.S.C. § 2000d.

4. 42 U.S.C. § 2000d-3.

5. The §604 restriction on enforcement of fair employment practices is tempered in appropriate cases by availability of the remedies of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., and of 42 U.S.C. §1983.

Although § 604 expressly curtails the authority of federal departments and agencies, it also restricts private suits. Thus, because of § 604, Title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds unless (1) providing employment is a primary objective of the federal aid,[6] or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid.[7]

Title VII of the Civil Rights Act of 1964[8] provides the primary statutory remedies for racial and ethnic discrimination in employment. Recognizing this, Congress supplemented the Rehabilitation Act by including in § 120(a) of the 1978 amendments a new subsection 505(a)(1)[9]

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6. See, e.g., Quiroz v. City of Santa Ana, 17 E.P.D. ¶8631 at p.7221 (C.D. Calif. 1978); Feliciano v. Romney, 363 F.Supp. 656, 672 (S.D.N.Y. 1973).

7. See Caulfield v. Board of Education, ___ F.2d ___, 17 E.P.D. ¶8600 at p.7078 (2d Cir. 1978); United States v. Jefferson County Board of Education, 372 F.2d 836, 883 (5th Cir. 1966).

8. 42 U.S.C. §2000e, et seq.

9. Section 505(a)(1) (to be codified as 29 U.S.C. §795(a)(1) provides in pertinent part:

> The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964. . . including the application of sections 706(f) through 706(k). . . shall be available, with respect to any complaint under section 501 of this Act, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.

which makes the pertinent remedies, procedures, and rights of Title VII available to federal employees who complain of handicap discrimination in employment in violation of § 501 of the Rehabilitation Act.[10] Congress also could have utilized Title VII to define the rights and remedies of a person in Trageser's position who must rely on § 504. Instead, for employees of private institutions receiving federal financial aid, § 120(a) of the 1978 amendments makes available only the remedies, procedures, and rights of Title VI, which, as we have noted above, contains the restriction of § 604. The distinction that § 120(a) draws between the relief available to federal employees and that available to employees of private institutions receiving federal assistance could not have been inadvertent. We therefore conclude that we must apply the limitation contained in § 604 of Title VI to § 504 of the Rehabilitation Act in literal compliance with §120(a) of the 1978 amendments.[11]

We cannot accept Trageser's contention that the 1978 amendments are inapplicable to her 1976 dismissal. We must decide this case in accordance with the law as it exists at the time we render our decision "'unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" Cort v. Ash,

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10. 29 U.S.C. § 791.

11. The Secretary of Health, Education, and Welfare has promulgated regulations to implement §504 of the Rehabilitation Act of 1973. See 45 C.F.R. Part 84 (1977). He has not, however, had an opportunity to conform thlse regulations to the 1978 amendments incorporating §604 of Title VI.

422 U.S. 66, 76-77 (1975). In the absence of legislative history to the contrary, the explicit incorporation of §604 of Title VI simply confirms a plausible reading of §504 as originally enacted. See, e.g., Guy, The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues, 7 U. Balt. L. Rev. 183, 207 (1978). We therefore find no manifest injustice in applying the amendments to illuminate this case which was pending when they were enacted.

A private action under § 504 to redress employment discrimination therefore may not be maintained unless a primary objective of the federal financial assistance is to provide employment. There has been no such allegation in this case; nor could there be one. Viewing the complaint in the light most favorable to Trageser, in compliance with Federal Rule of Civil Procedure 12(b)(6), we nevertheless hold that she cannot prevail on her § 504 claim.[12]

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12. Trageser's reliance on Davis v. Southeastern Community College, 574 F.2d 1158, 1159 (4th Cir. 1978), is misplaced. That was not an employment discrimination case. She also relies on several § 504 employment discrimination cases, decided prior to the 1978 amendments. See, e.g., Drennon v. Philadelphia General Hospital, 428 F.Supp. 809, 814-16 (E.D. Pa. 1977); Gurmankin v. Costanzo, 411 F.Supp. 982, 989 (E.D. Pa. 1976), aff'd on other grounds, 556 F.2d 184 (3d Cir. 1977) (dicta). These cases, however, did not address the application of § 604 of Title VI.

III

Trageser also based her complaint on 42 U.S.C. §1983, the fourteenth amendment, and the equal protection component of the due process clause in the fifth amendment. We conclude, however, that the district court correctly granted Libbie's motion to dismiss these claims.

Section 1983 requires Trageser to show that Libbie acted under color of either a state law or regulation or a state-enforced custom. Adickes v. S. H. Kress & Co., 398 U.S. 144, 148, 161-69 (1970). To establish a denial of equal protection of the laws in violation of the fifth and fourteenth amendments, Trageser is required to do more than merely allege governmental regulation of the nursing home. She must demonstrate that Libbie's ostensibly private conduct was in reality an act of either the state or federal government. There must exist "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). To satisfy this requirement, Trageser relies on (1) Libbie's receipt of public funds and (2) the state inspector's role in Libbie's decision to dismiss her.

Libbie did not participate in the Hill-Burton construction program which "subjects hospitals to an elaborate and intricate pattern of governmental regulations, both state and federal." See Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959, 964 (4th Cir. 1963). Consequently, our decision in Simkins which detected state aciton in the oper-

ation of participating hospitals does not control here. Moreover, we have previously held that the receipt of Medicaid funds does not convert private medical care to state action. Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977). For similar reasons, we decline to ascribe state action to Libbie's receipt of Medicare and Veterans Administration benefits.

To show state action, Trageser also relies on the query of the state inspector who, noting that her eyesight had deteriorated, asked what Libbie intended to do about it. The inspector did not include this observation about Trageser among the deficiencies found at the home, and Trageser does not allege that the state would or could impose any sanctions on Libbie if it continued to employ her. Libbie's subsequent decision to dismiss her, therefore, cannot be considered an action of the state itself. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

Consequently, neither Libbie's receipt of patients' benefits nor Virginia's regulation of the home constitutes state action sufficient to sustain the §1983 and constitutional claims.

The judgment of the district court is affirmed.

FILED, AUG 17, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NOVELLA H. TRAGESER	:	
	:	
v.	:	CIVIL
	:	ACTION
LIBBIE REHABILITATION CENTER, INC., etc.	:	NO. 77-0191-R

MEMORANDUM

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, defendant seeks in its motion of 3 August 1977 to dismiss the above styled action. As plaintiff's resonsive brief and defendant's rebuttal brief have both been timely filed with the Court, the matter is now ripe for disposition.

A brief summary of the facts may be helpful. The defendant is a private corporation which operates a nursing home in Richmond, Virginia for profit. It enjoys no tax-exempt status nor was construction of its nursing home funded under the Hill-Burton Act. Defendant receives payments for services rendered under the Medicare, Medicaid and Veteran's Administration programs and is subject to inspection by the State Department of Health.

Plaintiff, the Director of Nursing of said nursing home, suffers from retinitis pigmutosa, a progressive hereditary visual impairment. During a regular inspection of the nursing home in April of 1976, a representative of the Department of Health commented on plaintiff's failing eyesight. That comment was reported to defendant's Board of Directors. On 7 June 1976, the

Board of Directors resolved to replace plaintiff as Director of Nursing as soon as possible. Some three months later plaintiff tendered here resignation, effective 8 September 1975 and left defendant's employ.

Plaintiff's complaint alleges that in terminating her employment, defendant engaged in State action and acted under color of law so as to violate Amendments V and XIV of the United States Constitution and 42 U.S.C. § 1983. Plaintiff further alleges that defendant engaged in discrimination in violation of Section 794 of the Federal Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq.

To satisfy the State action requirement of Section 1983, plaintiff argues that regulation by the State renders action by the nursing home State action within the meaning of Section 1983. Defendant argues that the weight of authority is contra to plaintiff's position and cites, among others, Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972) and Jackson v. Metropolitan Edison, 419 U.S. 345 (1974). A careful reading of these two cases readily shows that more than mere regulation is necessary to constitute State action. As enunciated by the Supreme Court in Jackson, the test for State action in the context of State regulation is whether there is a sufficient close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. 419 U.S. at 351. As the decision in the instant case to replace plaintiff as Director of Nursing was that of the defendant's Board of Directors and not the State, such nexus as set forth in Jackson does not exist.

In support of her State action argument, plaintiff further argues that receipt of federal funding in the form of Medicare, Medicaid and Veteran's Administration programs by defendant's nursing home transforms the acts of the nursing home into those of the State. Plaintiff cites Doe v. Charleston Area Medical Center, 529 F.2d 638 (4th Cir. 1975) as authority. In Doe a woman desiring an abortion brought a class action against a private medical center which refused to perform abortions except to save the life of the mother, such refusal being based in part on a State abortion law. The Fourth Circuit held that federal jurisdiction existed as State action was present. Plaintiff argues that Doe is binding in the case at bar as Doe involved a private hospital which received Medicare and Medicaid funds. Doe is readily distinguishable, however, as the Fourth Circuit based its holding that State action was present not on the basis of federal funding but rather on the fact that in Doe the defendant's anti-abortion policy, being based on West Virginia's criminal abortion statute, involved the State sufficiently to constitute the policy "State action" under 42 U.S.C. §1983. In the instant case nothing in the stipulations supports any State sanction - at most a suggestion. Although plaintiff argues that defendant's Board of Directors based its dismissal of plaintiff on State accredation requirements, such position is supported nowhere in the record. Indeed, the State Department of Health did not even list plaintiff's handicap as a deficiency.

Finally, plaintiff alleges a claim under Section 794 of the Federal Rehabilitation Act of 1973, 29 U.S.C. §701, et. seq. Unlike Title VII of the Civil Rights Act, 42 U.S.C. §2000e-5, et seq, or the

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, the Federal Rehabilitation Act provides no specific grant of a private cause of action. There is no clear legislative history of Section 794 indicating a Congressional intent to provide a handicapped employee with a private right of action against his private employer. Furthermore, as Section 794 only pertains to "any program or activity receiving Federal financial assistance," jurisdicton cannot be invoked by plaintiff as defendant's nursing home has not received such assistance. The federal funds received by the nursing home are not "federal assistance" but rather payment for services rendered. Federal judges receive federal salary checks each month but it is not supposed that this is "assist." It is presumed that they are being paid an approximation, at least, of what they should be compensated for judging. Even if Section 794 creates a private right, which is not decided here, no such right could reasonably be contended for in the absence of a showing that said nursing home is a "program or activity receiving federal financial assistance."

An appropriate order shall issue.

[D. Dortch Warriner]
United States District Judge

FILED AUG 17, 1977 CLERK, U.S.D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NOVELLA H. TRAGESER	:	
	:	CIVIL ACTION
v.	:	NO: 77-0191-R
	:	
LIBBIE REHABILITATION CENTER, INC., etc.	:	

O R D E R

In accordance with the memorandum this day filed, and deeming it just and proper so to do, it is ADJUDGED and ORDERED that defendant Libbie Rehabilitation Center, Inc. t/a Libbie Convalescent Home's motion of 3 August 1977 to dismiss the above styled action be, and the same is hereby GRANTED.

Let the Clerk send a copy of this order and the memorandum to all counsel of record.

[D. Dortch Warriner]
United States District Judge

Dated: 16 August 1977

Supreme Court, U. S.
FILED
APR 16 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1454

NOVELLA H. TRAGESER,

Petitioner,

v.

LIBBIE REHABILITATION CENTER, INC.,

Respondent.

BRIEF FOR RESPONDENT LIBBIE REHABILITATION CENTER INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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April 16, 1979

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In The

Supreme Court of the United States

October Term, 1978

No. 78-1454

NOVELLA H. TRAGESER,

Petitioner,

v.

LIBBIE REHABILITATION CENTER, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Libbie Rehabilitation Center, Inc., respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

The opinion of the United States Court of Appeals for the Fourth Circuit in this action has now been reported. It may be found at 590 F. 2d 87 (4th Cir. 1978).

I.

QUESTIONS PRESENTED

1. Do payments under federal health care programs for services rendered constitute federal financial assistance within the meaning of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)?

2. Does Section 504 of the Rehabilitation Act of 1973

(29 U.S.C. § 794) confer an individual right of action upon one who contends he was subject to employment discrimination on the basis of a handicap?

3. Do the 1978 amendments to the Rehabilitation Act of 1973 create a new private remedy for one allegedly discriminated against on the basis of a handicap?

II.
STATEMENT OF THE CASE

The petition states (p. 6) that the broad questions whether there is a private right of action pursuant to Section 504 and what federal financial assistance means within the context of the Act are not at issue here. They are not issues only because petitioner has chosen not to designate them as issues. We disagree. We submit that they are threshold issues to the entire matter. If receipt of federal funds for services rendered is not federal financial assistance within the meaning of the Rehabilitation Act of 1973, and if that Act does not create a private right of action in any event, then irrespective of the purpose of the Act this petitioner has no standing in this action.

We accordingly respectfully request this Court to look beyond the questions the petitioner presents and to consider all the questions considered either by the Court of Appeals for the Fourth Circuit or the United States District Court for the Eastern District of Virginia in determining whether the writ should be granted. R. Stern and E. Gressman, SUPREME COURT PRACTICE (5th Ed. 1978), p. 491.

III.
REASONS FOR DENYING THE WRIT

While the trial court and the Court of Appeals differed in their reasoning both concluded that Mrs. Trageser had advanced neither constitutional nor statutory bases for relief.

They rejected her contention that the Rehabilitation Act of 1973 requires a private employer to continue in employment a person who by reason of a handicap unrelated to the employment and arising after the date of employment is unable, in the judgment of the employer, to perform the position for which she was employed.

To impose a requirement on a private employer to continue such a handicapped person in employment clearly represents a radical departure from traditional notions of the employer-employee relationship and of due process of law. As the courts below have found, if Congress had intended such a departure from the existing state of the law it could have expressed itself to that effect in the Rehabilitation Act of 1973 or in the 1978 amendments to the Act. Those amendments, incidentally, were enacted after the decision of the trial court and after oral argument in the Fourth Circuit. Congress did not do so. The courts below correctly concluded they should not imply a remedy where the Congress had not enacted one. The writ should accordingly be denied.

A. Payment For Services Rendered Does Not Constitute Federal Assistance Within The Meaning Of The Rehabilitation Act Of 1973.

Courts have consistently made a distinction between outright grants for federal health care programs and payment for services rendered under other health care programs. For example, some courts have held that receipt of Hill-Burton Act funds constitutes, in effect, federal financial assistance. *Sams* v. *Ohio Valley General Hospital Association,* 413 F. 2d 826 (4th Cir. 1969). But that same court, and many others, have held that receipt of Medicare or Medicaid funds for services rendered by a private physician or private hospital does not convert the medical facility or the physician into an agent of the United States.

Walker v. *Pierce,* 560 F. 2d 609 (4th Cir. 1977); *Ward* v. *St. Anthony's Hospital,* 476 F. 2d 671 (10th Cir. 1973); *Ozlu* v. *Lock Haven Hospital,* 369 F. Supp. 285 (M.D. Pa. 1974). Petitioner cites no case holding that receipt of Medicare or Medicaid funds constitutes a "program or activity receiving Federal financial assistance."

The purpose of the Act is not obscure. It is to prevent handicapped individuals from being denied, solely because of their handicap, the benefits of any program or activity receiving federal financial assistance. It may mean, for example, that a transportation authority receiving federal grants has a responsibility to consider the transportation needs of the handicapped. *Lloyd* v. *Regional Transportation Authority,* 548 F. 2d 1277 (7th Cir. 1977). But, as the courts below have properly concluded, it does not mean that petitioner has a constitutionally or statutorily protected right to continued employment by a private employer who is not operating a "program or activity receiving Federal financial assistance."

B. The Rehabilitation Act Of 1973 Does Not Create A Private Right Of Action Upon Petitioner.

Even if receipt of Medicare or Medicaid payments were to constitute federal financial assistance, which it does not, one searches in vain for any suggestion in the language of Section 504 of the Rehabilitation Act of 1973 that it creates a private right of action for discrimination in employment because of a handicap:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Since there is no explicit private right of action for discrimination in employment on the basis of a handicap petitioner urges this court, as she did the trial court and the Fourth Circuit, to imply such a right of action. *Cort* v. *Ash,* 422 U.S. 66, 78 (1975), sets out several tests to be considered in determining whether a private right of action should be implied where Congress has not specifically granted one:

1. Is the plaintiff one of the class for whose special benefit the statute was enacted? The class to be protected here are handicapped persons who seek to participate in, or derive the benefits of, federally assisted programs, not handicapped persons generally. Since there has been no denial of participation in a federally assisted program, the first test is not met.

2. Is there any indication of legislative intent, explicit or implicit, to create or to deny a private remedy? Congress is not inexperienced in remedying what it believes to be employment discrimination. The Age Discrimination in Employment Act, 29 U.S.C. § 621, 626, explicitly provides:

> "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act . . ."

Title VII of the Civil Rights Act of 1964 contains provisions affording similar relief, 42 U.S.C. § 2000e-5(f).

Congress enacted both these statutes prior to the Rehabilitation Act of 1973. It knew how to create a private right. The clear implication is that it intended not to do so in that Act. The second test is not met.

3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy?

The legislative history of the 1973 Act is contained in

Senate Report No. 93-318. That Report states, in part, 1973 U.S. Code, Congressional and Administrative News, p. 2032:

SHORT TITLE

> The short title of the bill, the "Rehabilitation Act of 1972," which no longer includes "Vocational," expresses the new thrust of the bill that individuals who apply for services must be given every opportunity to achieve a vocational goal. The bill allows entrance into the program for those whose eventual vocational outcome may not be obvious when they first apply. While the Committee expects and mandates in the Act that the program will remain vocationally oriented, it does believe that there are handicapped individuals whose handicaps are so severe, or because of other circumstances, such as age, that they may never achieve employment. The Committee feels that they should not be denied services.

And again, at p. 2143 of the same report:

SECTION 504

> This section prohibits discrimination, exclusion or denial of benefits to otherwise qualified handicapped individuals by any program or activity receiving Federal financial assistance.

The underlying purpose of the legislative scheme here is to provide for federally funded vocational and rehabilitation assistance and to that end to make certain there is no discrimination against handicapped persons in entry to, and in the benefit of, those programs. Implying a private right of action does not in any way further that purpose. The third test is not met.

4. Is the cause of action one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law? The answer to this question is certainly yes. The private employer—private

employee relationship is relegated to state law with certain limited exceptions such as insuring collective bargaining rights and eliminating discrimination based upon criteria prohibited by the XIV Amendment. All incidents of the employer-employee relationship, except those over which Congress has explicitly legislated, remain with the states.

In short, petitioner's attempt to imply a private right of action here fails each of the tests laid out in *Cort* v. *Ash,* 422 U.S. 66 (1975). Therefore the courts below were correct in refusing to imply a private remedy to plaintiff.

C. The 1978 Amendments To The Act Make It Clear That No Private Remedy Exists Against A Private Employer.

The petitioner argues that from 1973 on Section 504 of the Act outlawed all employment discrimination on the basis of handicap. Accordingly, says the petitioner, the 1978 amendments to the Act, which appear to make it explicit that there is no private remedy, actually should not be given that effect. This argument has no weight at all, unless

1. The 1973 Act outlawed handicap discrimination by private employers;
2. The 1973 Act created a private remedy; and
3. Administrative regulations take precedence over the clear wording of the Act.

None of these is the case, the first two for reasons already discussed. Therefore the construction of the 1978 amendment made by the Fourth Circuit is proper and should be affirmed (Petitioner's Brief; pp. 6A-7A):

> . . . Congress supplemented the Rehabilitation Act by including a § 120(a) of the 1978 amendments a new subsection 505(a)(1) which makes the pertinent remedies, procedures, and rights of Title VII available to federal employees who complain of handicap discrimi-

nation in employment in violation of § 501 of the Rehabilitation Act. Congress also could have utilized Title VII to define the rights and remedies of a person in Trageser's position who must rely on § 504. Instead, for employees of private institutions receiving federal financial aid, § 120(a) of the 1978 amendments makes available only the remedies, procedures, and rights of Title VI, which, as we have noted above, contains the restriction of § 604.

To put it another way, Title VII does give an employee a private right of action against his employer under certain circumstances. The 1978 amendments in their limited incorporation of Title VII give no right of action, public or private, unless the primary objective of the federal assistance is to provide employment. Here there is no showing that federal assistance is involved, much less that the primary objective of Medicare or Medicaid payments is to provide employment.

Unlike petitioner, we do not read the Department of Health, Education and Welfare regulations to reach a contrary result. The regulations themselves are not set out in the petition. They are merely paraphrased in a Senate report cited in the petition at pp. 15-16. That report does no more than reiterate what §§ 601 and 604 of the 1978 amendments provide—that programs receiving federal financial assistance are to be operated without discrimination on the basis of handicap.

At most the HEW regulations say that there may not be discrimination against the handicapped in federally assisted programs even if the purpose of those programs is something else than to provide employment. They suggest neither that Medicare or Medicaid payments constitute federal financial assistance nor that an employee of a private employer has a private remedy.

IV.

CONCLUSION

The trial court and the Court of Appeals gave this case mature consideration. There is no conflict between the wording of the Rehabilitation Act of 1973 and its 1978 amendments and the decision of the Fourth Circuit. The petition should therefore be denied.

Respectfully submitted,

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No. 78-1454

In the Supreme Court of the United States

OCTOBER TERM, 1978

NOVELLA H. TRAGESER, PETITIONER

v.

LIBBIE REHABILITATION CENTER, INC.,
T/A LIBBIE CONVALESCENT HOME

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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p. H3967	12
p. H3971	12
124 Cong. Rec. (daily ed. Sept. 20, 1978):	
p. S15548	11
pp. S15557-S15560	11
pp. S155568	11
p. S155571	11
pp. S18996-S18997	11
Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976)	2, 10
43 Fed. Reg. 2133-2135 (1978)	8
H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. (1978)	11
H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. (1978)	11
H.R. Rep. No. 95-1188, 95th Cong., 2d Sess. (1978)	11

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Rehabilitation Act of 1972: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972) .. 8
Rehabilitation Amendments of 1978: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources, 95th Cong., 2d Sess. (1978) .. 12
Rehabilitation Extension Amendments of 1977: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 12
S. Rep. No. 93-318, 93d Cong., 1st Sess. (1973) 8
S. Rep. No. 93-319, 93d Cong., 1st Sess. (1973) 8
S. Rep. No. 93-1139, 93d Cong., 2d Sess. (1974) 8
S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974) 8, 10
S. Rep. No. 95-890, 95th Cong., 2d Sess. (1978) 9, 11

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1454

NOVELLA H. TRAGESER, PETITIONER

v.

LIBBIE REHABILITATION CENTER, INC., T/A LIBBIE CONVALESCENT HOME

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance or * * * conducted by any Executive agency or by the United States Postal Service." The United States Department of Health, Education, and Welfare (HEW) has substantial responsibility for implementing Section 504 in connection with federally funded programs conducted by private

institutions and state and local governments. In accordance with Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976), the Secretary of HEW has promulgated detailed regulations concerning compliance with Section 504.[1]

This case involves the proper scope and application of Section 504 in the context of employment discrimination against handicapped persons. The HEW regulations make clear that the broad language of Section 504 encompasses claims of employment discrimination. Indeed, significant numbers of private enforcement actions and approximately one-half of the administrative complaints filed with HEW under Section 504 involve claims of employment discrimination. The United States therefore has a substantial interest in the construction of Section 504, and has, accordingly, participated as amicus curiae in this case in the court of appeals, as well as in *Southeastern Community College* v. *Davis*, No. 78-711 (argued April 23, 1979).

QUESTION PRESENTED

Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits recipients of federal financial assistance from discriminating against handicapped persons with regard to employment decisions.

[1] Section 504 also requires each "executive agency" to promulgate regulations for implementation of the antidiscrimination provision in its programs.

STATEMENT

Respondent, a private corporation, operates a nursing home that receives substantial federal funding under various federal programs.[2] Petitioner, who is a registered nurse, commenced employment with respondent in 1971, and in 1975 was promoted to be director of nurses. Petitioner suffers from retinitis pigmentosa, a hereditary, progressive disease of the eyes, which impairs her vision. In April 1976, a state health inspector commented to the nursing home administrator that petitioner's eyesight had grown worse since his last inspection.[3] Shortly thereafter, respondent's board of directors voted to terminate petitioner's employment. Upon learning of the board's decision, petitioner resigned. (Pet. App. 3A-4A).

Subsequently, petitioner filed this suit in the United States District Court for the Eastern District of Virginia. She primarily alleged that her termination violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.[4] In August 1977, the district court dismissed the complaint for failure to state a

[2] Respondent admittedly receives Medicare payments under Title XVII of the Social Security Act, 42 U.S.C. 1395 *et seq.*; Medicaid payments under Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*; and Veterans Administration benefits, 38 U.S.C. 601 *et seq.* (R. 14-15).

[3] Although the inspector allegedly asked the administrator what was going to be done about petitioner's condition, he apparently did not direct that petitioner be fired.

[4] Petitioner also claimed that respondent had violated her constitutional rights (Pet. App. 3A; R.3). These claims are not before this Court.

claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The court concluded (a) that respondent's relationship to, and supervision by, the State of Virginia did not rise to the level of state action; (b) that no implied private right of action arises under Section 504; and (c) that the federal monies received by respondent did not constitute "Federal financial assistance" within the purview of Section 504 (Pet. App. 11A-14A).

On appeal, the court affirmed the judgment of the district court, but on substantially different grounds. Following the initial briefing in the court of appeals, Congress passed the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978 ("the 1978 Amendments"), Pub. L. No. 95-602, 92 Stat. 2955. The court of appeals requested supplemental briefing on the effect of these amendments on petitioner's claims. In particular, the court focused upon Section 505(a)(2) of the Rehabilitation Act (to be codified at 29 U.S.C. 794(a)(2)), as added by Section 120 of the 1978 Amendments, 92 Stat. 2983. That statute provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved * * * under section 504 * * *." The court thereafter held that Section 505(a)(2) rendered Section 504 inapplicable to claims of employment discrimination "unless a primary objective of the federal financial assistance is to provide employment" (Pet. App. 8A). In the court of appeals' view, Section 505(a)(2) was intended to incorporate the

standards of Section 604 of Title VI, 42 U.S.C. 2000d-3, which states that Title VI covers claims of employment discrimination only "where a primary objective of the Federal financial assistance is to provide employment."

DISCUSSION

This case presents an important question concerning the scope of Section 504 of the Rehabilitation Act of 1973. Prior to the decision below, a majority of the complaints received by HEW under Section 504 involved claims of employment discrimination.[5] And regulations adopted by HEW, the agency charged with the responsibility for defining the practices that constitute discrimination and for coordinating implementation of Section 504 among federal departments and agencies, explicitly apply to discrimination in employment by any federal aid recipient. 45 C.F.R. 84.11-84.14. The severe limitation placed upon the applicability of Section 504 by the court of appeals will undoubtedly affect the willingness of recipient-employers to comply voluntarily with

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[5] In September 1977, David Tatel, Director of HEW's Office for Civil Rights, stated, in testimony before the Subcommittee on Select Education of the House Committee on Education and Labor, that as of that date approximately 70% of the Section 504 complaints received by his office involved employment discrimination. *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor* (hereinafter "Implementation Hearings"), 95th Cong., 1st Sess. 303, 317 (1977). In fiscal year 1978, 640 of the 1,363 complaints filed by handicapped individuals with HEW alleged employment discrimination.

Section 504 and its implementing regulations, to cooperate with an administrative investigation, or to conciliate regarding a probable violation (except in the relatively few instances where a primary purpose of the federal financial assistance is to provide employment).[6] In sum, the decision of the court of appeals that the recent amendments to the Act limit employment coverage to those instances where the primary objective of the federal assistance is to provide employment will have a significant effect upon enforcement of the statute.

One of the explicit purposes of the Act as passed in 1973 was to (29 U.S.C. 701(8))

> promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.

The non-discrimination provision contained in Section 504 was designed to insure that handicapped persons who had the ability to work and live independently in their communities would not be precluded from doing so because of discrimination based on their handicap (see point 1, *infra*). The decision of the court of appeals thus squarely conflicts with the congressional purpose that expressly underlies the Act.

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[6] For example, this decision has already been cited by defendants in a private suit under Section 504 arising outside of the Fourth Circuit. See *Hart* v. *County of Alameda*, No. C-79-0091 WHO (N.D. Cal. April 20, 1979).

Because Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, does not apply to employment discrimination against handicapped persons, the applicability of Section 504 to employment is essential to the accomplishment of a major purpose of the Rehabilitation Act. Employment discrimination against the handicapped, therefore, is not analogous to the situation under Title VI of the 1964 Act, where express limitations on the extent to which Title VI applies to employment discrimination merely carve out an area for exclusive enforcement under Title VII. In holding that those limitations should be carried over, by implication, to Section 504, the court of appeals has raised a question that threatens to disrupt HEW's on-going enforcement program. That decision warrants this Court's review.

1. As the court of appeals implicitly recognized, there is no doubt that prior to the 1978 Amendments, Section 504 prohibited any employer that received federal financial assistance from discriminating against otherwise qualified handicapped persons. The broad language of Section 504 makes no exception for discrimination in employment. Nor is such an exception fairly implied from the structure of the Act as a whole,[7] the pertinent legislative his-

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[7] See Section 2(8) of the Act, 29 U.S.C. 701(8), quoted *supra*. Indeed the Act originally defined handicapped persons in terms of their employability. See Pub. L. No. 93-112, Section 7(6), 87 Stat. 361, to be codified at 29 U.S.C. 706(6). In 1974, Congress amended Section 7(6) to emphasize that the defintion of handicapped person applicable to Section 504 is

tory,[8] or HEW's regulations.[9] To the contrary, these sources demonstrate with clarity that Section 504 applied to the employment decisions of all recipients of federal funds, and not just those who receive federal assistance for the purpose of providing employment. Accord, *Gurmankin* v. *Costanzo*, 556 F.2d 184, 186 (3d Cir. 1977); *Whitaker* v. *Board of Higher Education*, 461 F. Supp. 99 (E.D.N.Y. 1978); *Davis* v. *Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Duran* v. *City of Tampa*, 430 F. Supp. 75 and 451 F. Supp. 954 (M.D. Fla. 1977 and 1978). In light of this well-established construction of Section 504 and the aforementioned lack of overlap between Section 504 and Title VII of the 1964 Act, the court of appeals' limiting interpretation of this remedial statute would be justified only if the 1978 Amendments unequivocally required such a result. However, neither the language nor the legislative history of the amendments

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"not to be narrowly limited to employment." S. Rep. No. 93-1297, 93d Cong., 2d Sess. 37 (1974). See Pub. L. No. 93-516, Section 111(a), 88 Stat. 1619.

[8] See, *e.g.*, S. Rep. No. 93-318, 93d Cong., 1st Sess. 18-19, 70 (1973); S. Rep. No. 93-319, 93d Cong., 1st Sess. 2, 8 (1973); S. Rep. No. 93-1139, 93d Cong., 2d Sess. 23-25 (1974); S. Rep. No. 93-1297, *supra*, at 38; 119 Cong. Rec. 24587-24588 (1973) (remarks of Sen. Williams); *Rehabilitation Act of 1972: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 537, 1089, 1343-1363 (1972).

[9] See 45 C.F.R. 84.3(f), 84.3(k)(1), 84.11-84.14, 85.3(d), 85.52-85.55. See also 43 Fed. Reg. 2133-2135 (1978).

suggests that Congress intended to circumscribe the scope of Section 504.

2. *a.* The court of appeals concluded that Section 505(a)(2) grafted the substantive limitation found in Section 604 of Title VI onto Section 504. But Section 505(a)(2) says nothing about the scope of Section 504's coverage. It merely provides that the "remedies, procedures, and rights set forth in title VI * * * shall be available to any person aggrieved" by a violation of Section 504. This language strongly suggests that Congress intended Section 505(a)(2) to clarify or expand the remedies, procedures and rights previously "available" to handicapped individuals. See S. Rep. No. 95-890, 95th Cong., 2d Sess. 4 (1978). Had Congress sought to limit the scope of Section 504, it would have been far more natural to use a phrase such as "governed by" or "subject to" the provisions of Title VI, rather than a sentence making the remedies, procedures and rights of Title VI "available" to persons asserting claims under Section 504.

b. Moreover, nothing in the legislative history supports the conclusion of the court of appeals. Indeed, the legislative history makes clear that Section 505(a)(2) was intended only to provide a statutory basis for the administrative enforcement of Section 504. Although Section 504 was modeled after the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C.

1681, Congress omitted in 1973 to enact an administrative enforcement scheme applicable to Section 504 comparable to that included in Title VI (42 U.S.C. 2000d-1, 2000d-2) and Title IX (20 U.S.C. 1682, 1683). Congress subsequently recognized this omission, and initially directed that the appropriate executive agencies promulgate regulations to fill this void. See S. Rep. No. 93-1297, *supra*, at 39-40. Despite the congressional command, no regulations were immediately forthcoming. In April 1976, President Ford directed HEW to coordinate the implementation of Section 504 and to promulgate regulations governing compliance with, and enforcement of, that statute. Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976).

In May 1977 and January 1978, the Secretary of HEW issued comprehensive regulations in accordance with the presidential and congressional directives described above. See 45 C.F.R. Parts 84 and 85. Sections 84.61 and 85.5 of these regulations incorporate by express reference the administrative enforcement procedures applicable to Title VI. And the Senate Report accompanying the 1978 Amendments specifically points out that Section 505(a)(2) was intended merely to codify Sections 84.61 and 85.5 of the regulations:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practices as a specific statutory requirement.

S. Rep. No. 95-890, *supra*, at 19. In short, Section 505(a)(2) constitutes a "clarification and expansion" rather than a severe limitation on the applicability of Section 504. See *id.* at 4.[10]

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[10] Indeed, the continuing concern of Congress for the employment problems of the handicapped is reflected throughout the 1978 Amendments and their legislative history. For example, the 1978 Amendments include an Employment Opportunities for Handicapped Individuals Act (designated Title VI of the Rehabilitation Act). See Pub. L. No. 95-602, Section 201, 92 Stat. 2989-2995, to be codified at 29 U.S.C. 795 note. In addition, Section 122(a)(6) of the 1978 Amendments amended the definition of handicapped person applicable to Sections 503 and 504 "as such sections relate to employment." See 92 Stat. 2984-2985. See also, Sections 111(12) and 115( ) of the 1978 Amendments, 92 Stat. 2967, 2971. Moreover, the legislative history clearly evidences Congress' understanding that Section 504 broadly "prohibits discrimination solely by reason of handicap in *any* program or activity receiving Federal financial assistance," 124 Cong. Rec. S15568 (daily ed. Sept. 20, 1978) (remarks of Sen. Hathaway) (emphasis supplied), and that in particular Section 504 was designed to "insure better accessibility to jobs." *Oversight Hearings on the Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 268 (1978). See also *id.* at 96, 266, 743; H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 16, 18, 23-29, 34, 38, 42-43 (1978); H.R. Rep. No. 95-1188, 95th Cong., 2d Sess. 4 (1978); S. Rep. No. 95-890, *supra*, at 8, 13, 20-21, 27, 36; H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 80-81, 94-96, 98, 102 (1978); 124 Cong. Rec. S15548 (daily ed. Sept. 20, 1978) (remarks of co-sponsor Sen. Randolph); *id.* at S15557-S15560 (remarks of Sen. Javits); *id.* at S15571 (remarks of Sen. Dole); *id.* at S18996-S18997 (daily ed. Oct. 14, 1978) (remarks of Sen. Randolph); *id.* at H3965-H3966 (daily ed. May 16,

c. Finally, the court of appeals' reconstruction of Section 504 is directly in conflict with the regulations promulgated by HEW. Subpart B of those regulations expressly prohibits all recipients of federal financial assistance from discriminating in employment against handicapped persons. See 45 C.F.R. 84.11-84.16. And the explanatory comments to Subpart B specifically enumerate nursing homes such as respondent as typical recipients of federal funds subject to the employment provisions. See 45 C.F.R. Part 84, Appendix A at 381. This administrative construction by the agency in charge of enforcing Section 504 is entitled to great deference, especially where, as here, the regulations have been reviewed and accepted by Congress in the course of revising and reconsidering the statute in question.[11] See *Lorillard, Inc.* v. *Pons*, 434 U.S. 575, 580-581 (1978);

1978) (remarks of co-sponsor Rep. Brademas); *id.* at H3967 (remarks of Rep. Biaggi); *id.* at H3971 (remarks of Rep. Jeffords); *Implementation Hearings, supra*, at 51-57, 63-64, 68, 71, 73-74, 207, 214-215, 241, 243, 247, 253-254, 259, 294-295, 303, 315-319, 341, 426-430, 460-463, 464, 470; *Rehabilitation Amendments of 1978: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 93, 122, 179-184, 243-244 (1978); *Rehabilitation Extension Amendments of 1977: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 20, 555 (1977).

[11] See *Southeastern Community College* v. *Davis*, No. 78-711 (argued April 23, 1979), Brief for the United States as Amicus Curiae, at 45-55. A copy of this brief has been sent to counsel for respondent in this case.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 380-382 (1969).[12]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1979

[12] The district court dismissed this complaint because (a) Medicaid, Medicare and Veterans benefits do not constitute "Federal financial assistance," and (b) there is no implied right of action under Section 504. HEW's regulation squarely reject the former contention, see 45 C.F.R. Part 84, Appendix A, Sections 1 and 2, and the latter issue is currently before this Court in *Southeastern Community College* v. *Davis, supra*. We note, however, that unlike the state institution in *Southeastern*, respondent is a private corporation not subject to suit under 42 U.S.C. 1983. See also *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979).

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